

**IN THE MATTER OF THE HUMAN RIGHTS CODE,  
R.S.O. 1901, CH. 53, AS AMENDED;**

**AND IN THE MATTER OF A COMPLAINT MADE BY  
VICTOR ROMANO WITH THE ONTARIO HUMAN RIGHTS  
COMMISSION AGAINST THE BOARD OF EDUCATION FOR  
THE CITY OF NORTH YORK, AND G.L. ZUMPANO,  
SUPERVISOR OF TRANSPORTATION SERVICES, ALLEGING  
DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF  
ANCESTRY, PLACE OF ORIGIN AND ETHNIC ORIGIN**

**BOARD OF INQUIRY: Dr. D.J. Baum**

**APPEARANCES:**

Ontario Human Rights Commission -

Leith Hunter, Counsel  
Victor Romano, Complainant

Respondents -

J.P. Sanderson, Q.C., Counsel

**Hearings: February 18, April 7, 8 and 27, 1987 at Toronto, Ontario**



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The Complaint

This is a complaint alleging discrimination in employment because of a requirement of a level of English proficiency which the Commission claims is unnecessary to the fulfillment of the job of bus driver for the Board of Education for the City of North York (Respondent Board). The Commission argues that there was intent to discriminate within the meaning of section 4(1) of the Human Rights Code, and, in the alternative, there was discrimination of a prohibited kind within the meaning of section 10 of the Code. Following conferences by and between the parties, including Mr. Victor Romano, the Complainant, agreement was reached as to a statement of facts, which facilitated hearing on this matter. The agreed statement of facts are as follows:

1. Victor Romano, the complainant herein, is a Canadian citizen of Italian ancestry who emigrated to Canada from Italy in 1956. English is his second language.
2. G.L. Zumpano, one of the respondents, is an employee of the North York Board of Education who works as its supervisor of Transportation Services.
3. On the 29th of June, 1984, Victor Romano was hired by Edward Bodnar, Mr. Zumpano's predecessor, to work as a temporary bus driver for the summer period.
4. When the summer period was over, Mr. Romano was given further work and he worked continuously to the Christmas holidays. He filled in for full-time drivers who were absent.
5. Victor Romano did not work for a period of time over the Christmas holidays, but began again in January of 1985.
6. Mr. G.L. Zumpano began work as the Supervisor of Transportation Services on the 15th of October, 1984.
7. At the end of January, 1985, a temporary bus driver resigned. Mr. Zumpano initiated a hiring process. Five persons, including Mr. Romano, had applications for employment in the file. Four of these persons were interviewed and assessed. One

applicant withdrew from the process. Mr. Louis Kovacs, whose first language is English, was found by Mr. Zumpano to have the best qualifications among the four applicants to fill the position and he was awarded the position.

8. Mr. Romano was not offered the position by Mr. Zumpano in that his written and oral English were considered by Mr. Zumpano to be deficient in performing the duties of a school bus driver.

9. On the 25th of February, 1985, Victor Romano was informed that his employment was terminated and that his last day of work would be the 8th of March, 1985.

10. Victor Romano has not been offered any work at the Board of Education for the City of North York since the 8th of March, 1985.

As noted, there are two distinct parts to the complaint: The first part alleges direct discrimination within the meaning of section 4(1); and the second part alleges indirect discrimination within the meaning of section 10 of the Code. The only respondents named by the Commission are the Board and Mr. Zumpano. However, in the course of the hearing, the Commission argued that Roy Blackwell, one of two lead hands, both of whom are members of the bargaining unit, exhibited direct bias against Mr. Romano, and infected the decision-making process of Mr. Zumpano in his determination as to the contested job vacancy.

The Commission did not seek to amend the complaint to either name Mr. Blackwell as a respondent, or to include him in the factual narration.

The section 10 portion of the complaint, in the result, is not one directed against those of Italian origin in general. Rather, the Commission stated that the level of English proficiency demanded by the respondents impacted especially hard on a group of Italians typified by Mr. Romano. In saying this, the Commission noted that there might indeed be other groups whose first language is not English, or whose first language is English but who do not possess the language skills required by the respondents.

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Background

Mr. Romano

Both Commission Counsel and Counsel for the Respondents elaborated upon the agreed statement of facts. I think it useful to describe Mr. Romano in terms of his background, his work at the Board as a bus driver, and how he impressed me as a witness.

Mr. Romano is forty-nine years old, and he has been married for twenty-three years. He has three children. In 1956, at the age of sixteen, he emigrated to Canada from his native city of Cosenza, which is south of Naples. On arriving in Canada, Mr. Romano settled in Toronto where he has since lived, staying initially with his brother. For about eighteen years, Mr. Romano worked in a variety of construction and industrial jobs. The last industrial job was one which he held for about thirteen years until he injured his back.

Following that injury, which apparently limited the amount of heavy physical labour he could expend, Mr. Romano sought and obtained a position in 1978 with Charterways Bus Company, which at the time was involved in the transportation of children attending schools of the separate school board. Charterways, as a condition of employment, had Mr. Romano undertake a five-week training programme. There were three purposes to that programme: to obtain a Class B license to drive a school bus; to be able to perform routine inspections of the bus; and to be able to handle the student passengers.

Mr. Romano successfully completed the course, and continued to work for Charterways for about two years. During that time, he tended to service a single school, but in doing so it is fair to say that he frequently made numerous calls to different locations. In effect, he had to and did learn much of greater Toronto and southern Ontario.

Mr. Romano left Charterways and worked for a small school bus company, Canadian Travel. He performed the same kind of job as he had done for Charterways, and he stayed with that company for one year after which he moved to Koko Transportation where he also drove a school bus. In this regard, while Mr. Romano tended to serve a single school, he had to remain flexible. It became necessary, depending on driver availability, for him to

substitute for other drivers or to take additional runs. This was often done by radio. The importance of this point is obvious: Mr. Romano had to understand the dispatcher, and the dispatcher had to understand him. Mr. Romano worked for Koko Transportation for about two years.

There was limited, and I emphasize this point, written work connected with any of the school bus jobs held by Mr. Romano. On a daily basis, he was required to complete forms which listed the trips made; the identity of the locations (including the schools); the number of student passengers; and the miles or kilometers for each trip. While Mr. Romano did not have difficulty providing the lists required, he did experience some problems whenever computations had to be done. However, since such computations were only a minor part of his total job, such difficulties did not affect his employment.

Mr. Romano's employment record demonstrates beyond any question that he has been both a conscientious and competent employee. It is probably fair to say that all of the jobs he has held have required some capacity in terms of using the English language.

Yet, when Mr. Romano came to Canada, his formal education had ended at about grade five. He had no knowledge of the English language. In the more than thirty years that have passed since his arrival in Toronto, he has not enrolled in any formal English as a second language course. His knowledge of English has come from association with friends, co-workers, and its use within his own family.

Mr. Romano was industrious in finding employment and bettering his work opportunities. In the course of driving for other school bus companies, Mr. Romano met other drivers, some of whom worked for the respondent Board. They suggested that Mr. Romano apply for a job as bus driver. Mr. Romano obtained an application form from the Board, and he freely admitted that his son filled in the answers. The completed application was submitted in 1981. In the result, that application was not acted on until Mr. Romano personally called upon the Board for employment some three years later.

A. Brennan was Supervisor of Transportation for the Board at the time Mr. Romano submitted his application. At the time, Mr. Brennan noted on the application that it had been completed by Mr. Romano's son. Mr. Brennan added that he questioned whether Mr. Romano had the requisite skills in reading and writing English for the position of bus driver.

However, Mr. Brennan continued, he found Mr. Romano to be a "nice person."

In June 1984, Edward Bodnar, who had been Assistant Supervisor of Transportation for the Board, was promoted to Supervisor on the retirement of Mr. Brennan. He remained in that position for two months before moving to Essex County to take a new job.

At the time of his promotion, apparently several positions opened for a school bus driver. Mr. Romano heard of the opportunities and visited the Board's offices. Mr. Bodnar asked him to fill out an application, and it was then that Mr. Romano indicated that one was already on file. Mr. Bodnar retrieved the application and saw the comments made by his predecessor, Mr. Brennan, who was still employed but in transition to retirement. Among the criteria which concerned Mr. Bodnar in assessing job candidates, in addition to the requisite Class "B" license, was whether they had any criminal record and whether they would be able to handle stress in terms of people contact. On all these points he found Mr. Romano satisfactory.

But, what about Mr. Romano's ability to communicate? Mr. Brennan had expressed some hesitancy. Mr. Bodnar checked with Mr. Brennan, and he was told that the decision had to be that of the new Supervisor (Mr. Bodnar). Commission Counsel put these questions to Mr. Bodnar:

Q. Now, ... were you concerned about somebody's ability to communicate when you interviewed them?

A. Verbally, I wanted to be sure they understood their instructions, and that was part of the purpose of the interview. We would see how they would react to questions asked of them.

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Q. ... What about written communication? Were you concerned about that?

A. Mildly, it never occurred to me that it would be a major stumbling block.

How, then, did Mr. Romano fare in the interview? Mr. Bodnar thought well



of him. He solicited the advice of Mr. Roy Blackwell, a lead hand who helped monitor driver performance, as to Mr. Romano. In what he described as rather typical of Mr. Blackwell, Mr. Bodnar received a non-committal reply. Mr. Bodnar had to come to his own judgment concerning Mr. Romano, and this was his evaluation:

Well, he created an impression on me. He told me that he was willing to do what had to be done, and to learn what he didn't know how to do. And, it didn't matter on what run he was placed, or what he was asked to do, that he would be more than happy to do it

He seemed very cooperative, personable and that comment is also noted in Mr. Brennan's remarks on the application, and you want somebody that can get along with people in that position [of bus driver].

The impression given Mr. Bodnar by Romano proved to be accurate. As noted before, it was part of the job of Mr. Blackwell, a lead hand, to monitor new drivers. If there were problems, he was to report those difficulties to Mr. Bodnar. No such reports were received. Indeed, throughout Mr. Romano's brief career with the Board, it is fair to say that his work as a school bus driver, as a cooperative, helpful and personable employee, is beyond any question.

Throughout these proceedings, Mr. Romano displayed the same characteristics. His testimony in both direct and cross-examination was candid. It represented the truth as Mr. Romano understood the facts.

There are two final points in this background statement concerning Mr. Romano. They relate to the nature of his employment:

1. The evidence is clear beyond any doubt that Mr. Romano was hired as a temporary bus driver. Specifically, his term of employment was from June 29 to August 3, 1984. He was to assist in helping the Board meet its summer transportation requirements.

At the end of the summer period Mr. Bodnar continued to retain Mr. Romano as a temporary driver. In doing this Mr. Bodnar testified: "I made it plain to Mr. Romano and anybody else that



we talked to, that it was a temporary position, that ultimately it could evolve into something more, but that I was making no promises, and that [condition] was just not made to Mr. Romano, but to every other person that was hired ... under those same circumstances."

There were no problems concerning communication. Indeed, Mr. Bodnar found Mr. Romano had an "edge" over another regular Board bus driver, F. Palermo, also of Italian extraction.

2. As a temporary bus driver, it is fair to say that Mr. Romano's job in some respects was more difficult than that of regular drivers. He, unlike the regular drivers, did not have an established route. Rather, Mr. Romano had to be able to drive wherever there was a need. If he didn't know of a location, then he had to be able to ask and, in that regard, take the appropriate instructions. For a Board as large as that of North York, with students visiting sites throughout Metro Toronto, this was no small feat for a temporary bus driver.

Even as a temporary bus driver, Mr. Romano was a member of the bargaining unit that included approximately forty-two regular Board bus drivers (and a complement of about seven spare drivers). As such, Mr. Romano, like other members of the bargaining unit, was represented by a union, namely, the Canadian Union of Public Employees, Local 922, and he had access to the grievance procedure of the collective agreement, a procedure that applied both to the posting of job opportunities and termination of employment.

### The Board and Transportation Services

The Board is large and it employs about 6,000 persons. Gene Porter, Superintendent of Personnel Services for the Board, spoke to its employment policies. In this regard, Mr. Porter emphasized two aspects of those policies which bear on the matters before this Board of Inquiry:

1. It has long been a Board policy to promote from within. He said, "... [W]e certainly do everything we can to train people from within so that when we have opportunities for promotion, that we certainly try to fill them from within. That

is one of our aims, in terms of promotion."

This policy extends through the ranks. It should have applied to the job posting sought by Mr. Romano which forms a significant part of the complaint. The question was put by Commission Counsel as to why that policy was not applied. Mr. Porter noted that Mr. Zumpano, the Supervisor of Transportation Services, was new to the job, and, what is more, he came to the position from outside the Board:

I think possibly the newness of Mr. Zumpano to that position in the Board and the fact that he had many, many other, I guess more urgent matters on hand, that he didn't have time to address himself to all the many policies of the Board . . . .

Since that time, because he has been employed with us now since that period of time, I think you would find he is well aware of our general concerns and what we would like to have accomplished.

2. About the time of the events relevant to this complaint, the Board was completing the formulation and implementation of an innovative affirmative action programme for women and racial minorities. It is an employment programme that reaches into the community. And, it is one that has been discussed and met with the approval of the Human Rights Commission.

It is abundantly clear that the Board is committed to the fulfillment of human rights objectives as a matter of policy. Yet, having said that, it must also be stated that while the Board conducts intensive educational programmes relating to such policies, it is an entirely different matter as to whether Mr. Zumpano was sensitive to the Board's concerns at the point of his hire as Supervisor of Transportation Services.

### III

#### Findings as to Discrimination

As noted earlier, there are two parts to the Commission's complaint: The first part deals with a charge of direct discrimination against Mr. Romano on the enumerated grounds. The second relates to discrimination within the meaning of section 10 of the Code. While there may be some overlap in the findings as between the two parts of the complaint, it will be useful to make that division in setting out the findings of fact.

#### Direct Discrimination

The complaint did not, as such, spell out the claim of direct discrimination. Rather, the thrust of the complaint seemed directed at Mr. Zumpano as Supervisor of Transportation Services. Paragraph 5 of the complaint, for example, states: "On or about March 1, 1985, Mr. Zumpano called me into his office. He told me that my work was good but there was a problem with my English, and therefore he had hired someone else to take Jim Clifton's place [the position for which Mr. Romano competed]. He would not explain to me what the language problem was. Then he told me they no longer needed an interim driver, and my employment would be terminated as of March 8, 1985. Mr. R. Smith (Dispatcher) was present during this interview."

In the course of the hearing, however, the Commission developed what it believed to be direct anti-Italian bias by Roy Blackwell, the second lead hand along with Mr. Smith. As a lead hand, Mr. Blackwell came into contact with Mr. Romano as a dispatcher and as a "trouble shooter" handling complaints. Sometimes the contact was by radio to and from the school buses and sometimes it related to instructions given drivers at the start of their day, or while they were on the road. Remo Melaragno, a regular bus driver for the Board, provided the testimony central to the claim of a demonstrated bias against Italians by Mr. Blackwell. His testimony is given in full:

Q. Did you ever hear Victor Romano and Frank Palermo speak Italian on the radio?

A. I did once, yes. I did hear once.

Q. Can you tell me the nature of the exchange?

A. Well, it was after hours one night. We were on overtime that night, and I think they said "Hi" to each other in Italian, or just a few words.

Q. Can you tell me what happened after that?

A. Then I heard some other comments over the radio from the office of the dispatcher, a gentleman, Roy Blackwell. The comment was, he spoke to another driver over the radio and said, "We had better learn to speak Italian around here, because this sounds like Little Italy, if we want to get ahead."

Q. Can you tell me how you took those comments?

A. Well, personally, myself, I didn't feel right about it because I am Italian, and I feel that this was a little bit of discrimination.

The comment that has been italicized and underlined was singled out as a statement depicting an anti-Italian bias on the part of Mr. Blackwell. And, in Mr. Melaragno's view, that bias was specifically applied by Mr. Blackwell against Mr. Romano:

Q. ... So when Mr. Blackwell made this comment, why did you view that as an act of discrimination?

A. Because I heard other comments from Roy Blackwell other times, speaking with Victor [Romano], and he was kind of mad almost every time he spoke to him. So I formed the opinion that he had some kind of discrimination against him.

Q. Isn't it possible that Blackwell and Romano didn't get along; they didn't like each other?

A. I don't know, sir.

....

A. Well, repeating myself, I heard other comments in between Mr. Romano and Roy Blackwell. Most of the mornings, I went to work, I met Victor Romano and Roy Blackwell in the corridor

downstairs when you enter the door, which has a big map there, and trying to show Victor the route he had to do that day, and I heard him making comments that, you know, kind of swearing at him, you know, and "Can't you understand? Don't you know how to do this run?" and so on, you know, comments like this.

....

Q. That is what you heard?

A. That is why I formed this opinion of him [Mr. Blackwell], not only because of the comments.

Q. Well, what has that to do with discrimination?

A. Well, you know, what can I say? I mean, I formed that opinion.

Q. You formed it on the basis of the information you have just given us?

A. I formed that opinion on the basis of what I heard, all the comments that I heard in between these two people.

Q. And what you heard are the comments that you have just given to us in evidence?

A. Yes.

The only other testimony on which the Commission relies to demonstrate an anti-Italian bias on the part of Mr. Blackwell is that of Mr. Romano. In this regard, there is absolutely nothing in Mr. Romano's evidence that indicates even anger on the part of Mr. Blackwell against him. In direct examination, Commission Counsel asked Mr. Romano:

Q. Are you aware of whether you had any trouble with Mr. Blackwell?

A. Yes. He complained he couldn't understand me, but at that time I was very far away, but we couldn't communicate with each other, but he said that he had to go to an Italian school to

spoke with us.

Q. Do you remember when that was?

A. It was about two or three weeks before I was let go.

Did Mr. Romano believe that Mr. Blackwell by that remark conveyed an anti-Italian animus generally or specifically against him? In the result, what Mr. Romano seemed to be saying was that he believed that Mr. Blackwell thought his work as a driver was good but that, from time to time, there were language problems. Consider the following testimony of Mr. Romano in direct examination:

A. Mr. Blackwell, he does not complain either, except a couple of times he started with me.

Q. I am sorry?

A. A couple of times Mr. Blackwell, he said to me, "Victor, how does the kids they act on the bus?" I said, "Very good."

Q. Did he complain to you about the forms that you filled out ... ?

A. No.

Q. ... for the work that you did as a bus driver?

A. No.

Q. Did he complain to you in any way at all?

A. Not at all.

THE CHAIRMAN: I thought, Mr. Romano, you had earlier stated that Mr. Blackwell did complain on the radio at one point. Is that a misunderstanding?

THE WITNESS: On the radio, yes.

THE CHAIRMAN: He did complain?

THE WITNESS: Yes, but we . . . you, Ms. Hunter [Commission Counsel], you asked me complaining about what. I didn't understand.

BY MS. HUNTER:

Q. Okay. During the time that you worked at the North York Board of Education . . .

A. Yes?

Q. . . . I was asking whether Mr. Blackwell had complained about the work that you had done. Did he tell you that you hadn't worked properly as a bus driver? Did he tell you that you hadn't filled out your forms properly?

A. . . . No, not by the work and not . . . just language.

The Respondents did not call Mr. Blackwell to respond to the testimony of either Mr. Melaragno or Mr. Romano. Their Counsel argued, in effect, that this was not necessary. Mr. Blackwell was not named as a Respondent. Indeed, he was not even mentioned in the complaint. Moreover, the evidence given on direct examination by Messrs. Melaragno and Romano did not require that Mr. Blackwell be called to testify.

For its part, the Commission argued that in the face of the evidence given and described above, an adverse inference should be drawn against Mr. Blackwell by his failure to testify. More importantly, the thrust of that inference should be, according to the Commission, that Mr. Blackwell was indeed biased against Italians, and that he demonstrated a specific bias against Mr. Romano.

As a general proposition, it may be that an adverse inference should be drawn against a person not testifying who could have elucidated facts about which another witness has testified. But how does that proposition apply to Mr. Blackwell? What did Mr. Melaragno say that demonstrated an anti-Italian bias on the part of Mr. Blackwell? There were two bits of evidence: The first was a comment, accepting in full Mr. Melaragno's evidence, made by Mr. Blackwell after he heard Mr. Romano and Mr. Palermo conversing briefly on the bus radio in Italian. Accepting Mr. Melaragno's description of Mr. Blackwell's statement, even though it differs somewhat



from that of Mr. Romano, can it be said that it reflected an anti-Italian bias? I think not. There is simply nothing in the statement that reflects bias. This is not to deny that the statement was ill-considered, that it was a flip and unnecessary remark.

The Commission asserted, however, that the statement ought to be considered with Mr. Melaragno's description of Mr. Blackwell's behaviour toward Mr. Romano. According to Mr. Melaragno, that behaviour could be characterized as one of anger on the part of Mr. Blackwell. Mr. Melaragno interpreted that behaviour as reflecting an anti-Italian bias.

Let us assume for the moment that the facts descriptive of the behaviour are as Mr. Melaragno testified. On their face, all that the facts represent is anger on the part of Mr. Blackwell toward Mr. Romano in understanding directions. There is nothing in the facts that reflect an anti-Italian bias.

More to the point, however, is how Mr. Romano, himself, understood Mr. Blackwell's behaviour toward him. Mr. Romano left no doubt that he believed Mr. Blackwell found his work acceptable, except for some language problems. At no point in his testimony did Mr. Romano indicate that he perceived a bias on the part of Mr. Blackwell.

Indeed, Mr. Romano's impressions are borne out by other evidence introduced by the Commission. I refer to the testimony of Mr. Bodnar, who hired Mr. Romano. Commission Counsel questioned Mr. Bodnar concerning Mr. Blackwell's evaluation of Mr. Romano:

Q. ... [D]id you have any concerns about his [Mr. Romano's] ability to communicate either orally or in writing?

A. I had no concerns orally. The written communication, it hadn't really occurred to me that it might be a problem, and ... there was also a reason for inviting Mr. Blackwell in after I had sort of made a decision ... after doing interviews you get a one-track mind and you like a second opinion ....

Q. Did Mr. Blackwell express to you an opinion as to whether Mr. Romano should be given a position? Was he negative otherwise? What was his view?

A. No ... [H]e said he [Mr. Romano] is a nice guy. But, Mr.

Blackwell, I don't think, would say to you, "It is your decision, but, yes, I think he will work out."

MS. HUNTER: I am sorry?

THE WITNESS: Almost non-committal, but a passing comment that he thought he [Mr. Romano] would work out.

THE CHAIRMAN: I hear your answer as you asked Mr. Blackwell for a second opinion, because you wanted one. Mr. Blackwell's response was essentially non-committal, but he [Mr. Romano] is a nice guy.

Is that correct?

THE WITNESS: That is correct.

Once Mr. Romano was hired, Mr. Bodnar expected Mr. Blackwell, as lead hand, to monitor work performance. Bearing in mind that Mr. Melaragno's testimony left one with the impression of an ongoing anger by Mr. Blackwell against Mr. Romano, and if the conclusion urged by the Commission of bias on the part of Mr. Blackwell were true, then there ought to have been some indication of poor work by Mr. Romano flowing to Mr. Bodnar. This did not happen. Mr. Bodnar testified:

Generally, with new drivers I would ask Mr. Blackwell, who was at that time, lead hand, but sort of in the interim period was also serving as almost like an assistant, just to keep an eye on things and to let me know if anything untoward was seen. I received no negative reports.

In the result, considering the fact that Mr. Blackwell did not testify, and weighing the evidence of Messrs. Melaragno, Romano and Bodnar, I find no basis for concluding that there was an anti-Italian bias on the part of Mr. Blackwell. Indeed, the evidence seems to support the conclusions arrived at by the Complainant, himself:

1. Mr. Blackwell either was non-committal or even supported the initial hiring of Mr. Romano.
2. Mr. Blackwell made no adverse comments concerning Mr.

Romano's ability to drive a school.

3. Mr. Blackwell's sole concern relating to Mr. Romano centred on his ability to communicate.

The Commission sought to build on the alleged bias of Mr. Blackwell in order to impute that bias to the Board and Mr. Zumpano. This was necessary because, although he was a lead hand, Mr. Blackwell remained a member of the bargaining unit and, as such, was not part of management. For example, he had no capacity to discipline other employees. The argument was made that Mr. Blackwell had input into the decision of Mr. Zumpano as to who should have been awarded the vacant position of bus driver. If Mr. Blackwell were biased within the meaning of section 4(1) of the Code, then the whole of the decision of Mr. Zumpano should be set aside as being biased, for it should be considered infected by a consideration condemned by the Code. Because of the findings made concerning bias on the part of Mr. Blackwell, this portion of the Commission's case must be dismissed.

#### Section 10 of the Code

This portion of the complaint relates to the nature of the English language requirement imposed on Mr. Romano as a condition of employment. To establish the facts viewed as necessary to support the complaint, the Commission sought to demonstrate the following:

1. The requirement imposed by Mr. Zumpano was both subjective and unreasonable. It bore no objective relationship to the job of driving a school bus.
2. Mr. Zumpano had no authority to impose the requirement in question.
3. The requirement impacted especially upon a group who immigrated to Canada from Italy. By this, Commission Counsel explained: "What matters is that I have to persuade you, based on the evidence, that Mr. Romano, an Italian, has suffered as other Italians would. I have to prove to you that he has a problem typical of that group which is defined as having a place of origin that is Italy . . . . In my submission, I think that is all that I have to prove to you, but that is enough."

I will deal first with the requirement imposed by Mr. Zumpano, its rationale, and its implementation as applied to Mr. Romano. Earlier in this Award, I set out the Board policy to promote from within wherever possible. This was a policy that surely was not followed by Mr. Zumpano in connection with the questioned job vacancy. Part of the reason for this was that at the time Mr. Zumpano was new to the Board and his job.

Before going into the job vacancy and the process of filling that vacancy, it may be useful to set out some of the background relating to Mr. Zumpano. Board Counsel noted that in some respects Mr. Zumpano and Mr. Romano both immigrated from Italy. Mr. Zumpano completed grade eight in Italy and came to Canada when he was sixteen years old. Italian was his first language. In Canada, Mr. Zumpano attended and was graduated from high school. He has also taken about eleven courses with the Society of Management Accountants.

Mr. Zumpano was one of several candidates, including Mr. Smith, a lead hand in the Board's Transportation Services, who competed for the position of Supervisor of Transportation. Mr. Zumpano held a comparable position, though smaller in size, designated as Transportation Planner with Scarborough Board of Education. He was named Supervisor of Transportation Services with the Respondent Board on October 15, 1984.

Before proceeding further, I note that while Mr. Zumpano is of Italian origin, I draw no inference of an absence of discrimination from that fact alone. What was said by the Board of Inquiry in Dhaliwal and Director, Human Rights Code v. B.C. Timber Ltd., 4 C.H.R.R. D/1520, ¶13089, at ¶13327 (August 1983), may usefully be repeated here:

There was also a fallacy in the company's argument in so far as it suggests that a person cannot be guilty of discrimination against a member of the same race. There is no reason in law or in logic why it should not be possible, for example, to find an East Indian employer guilty of racial discrimination if he were to display bias against his own people and prefer to employ a person of Chinese or Anglo-Saxon origin.

Whether there has been discrimination of the kind prohibited by the Code can only be determined by looking to the record as a whole. This is what I intend to do.

When Mr. Zumpano came to the Board, there was a pool of about seven temporary or spare drivers of whom Mr. Romano was one. While the pool was not employed on a permanent basis, Mr. Romano and others were in fact working a regular week. After an initial period of orientation, Mr. Zumpano found that he had an extra driver on staff. The reason was that Mr. Smith, a lead hand and dispatcher, had served as an interim supervisor until Mr. Zumpano was named to that position. Mr. Smith was returned to his regular duties, and so down the line there was no longer the need for one driver.

It was Mr. Zumpano's evidence that he had a discussion in December with the two lead hands, Messrs. Smith and Blackwell, concerning staffing complements. The specific purpose of that discussion was to determine if there was indeed an excess number of drivers, and incidentally, to comment on the job performance of Mr. Romano who had the least seniority among the temporary drivers.

It is fair to say that Mr. Zumpano's view of that discussion was as follows:

1. Both Messrs. Smith and Blackwell expressed "concerns" about Mr. Romano's ability to conduct day-to-day operations because of his limited capacity in handling the English language.
2. Neither Mr. Smith nor Mr. Blackwell offered any specifics that Mr. Zumpano could recall.

As we shall see, that evaluation had some bearing on Mr. Zumpano's later decision to award the vacant regular bus driver's job to another candidate. It will suffice here to note that Mr. Smith's evidence is quite different from that of Mr. Zumpano. Mr. Smith testified that he found Mr. Romano an excellent driver. Indeed, it was Mr. Smith who encouraged Mr. Romano to apply for the job vacancy.

There is an issue of credibility in terms of the evidence of Mr. Smith and Mr. Zumpano on the question as to the evaluation of Mr. Romano as a driver. On balance, I find that the issue must be resolved in favour of the testimony of Mr. Smith. As noted, there is no doubt that he suggested to Mr. Romano that he apply for the job vacancy. Further, after Mr. Romano had been terminated in December, there was a short-term need for a driver in January. Mr. Smith specifically asked Mr. Zumpano if the position could

be filled by Mr. Romano, and Mr. Zupano gave his consent. (Mr. Zumpano justified re-employing Mr. Romano on the ground that there is a difference between hiring a driver for a short-term and hiring a driver as a regular employee.) The point is that all of Mr. Smith's actions support his endorsement of Mr. Romano as a qualified driver.

What then is to be concluded as a result of this finding going to credibility? The December meeting with the lead hands was the first time any concern had been raised relating to Mr. Romano's proficiency in English by either Mr. Smith or Mr. Blackwell, according to the testimony of Mr. Zumpano. Indeed, the purpose of the December meeting was not, as such, to discuss English proficiency generally or Mr. Romano particularly. It was to discuss staffing complement.

However, Mr. Zumpano used the December meeting to begin to set a standard that reflected his view of English proficiency. There is little doubt in my mind that Mr. Blackwell experienced some problems with Mr. Romano relating to communication in English. But those problems never rose to the level of formal complaint by Mr. Blackwell. Mr. Romano, in the result, was suitable for the job until the time of his termination. And, when that termination came at the start of the winter vacation, not a word was said by Mr. Zumpano to Mr. Romano relating to English proficiency. Rather, the termination was justified on the basis of Transportation Services having an excess number of drivers.

Still, for Mr. Zumpano the groundwork had been laid for a higher standard of English proficiency. This is reflected in an earlier discussion, dating sometime in November, that Mr. Zumpano reported with Mr. Hickman who was charged with compiling statistics from green forms which the drivers submitted to him at the end of the working day. Among other things, the forms requiring only simple English skills allowed for the computation of mileage. Mr. Romano freely admitted that he had some difficulty doing the calculations necessary to compute mileage. He had this difficulty from the start of his employment with the Board. Mr. Romano testified that Mr. Hickman helped him, and in this regard probably did the necessary calculations. Until a conversation which Mr. Zumpano had with Mr. Hickman in November, there is absolutely no evidence that the inability to carry out the calculations was seen as a major problem. Indeed, Mr. Bodnar testified that completion of the forms was not a significant part of a bus driver's job.



Mr. Zumpano had this to say of the November conversation with Mr. Hickman:

Well, I explained to Mr. Hickman that I put a lot of weight on making sure that the green sheets ... were filled properly, and the information was recorded properly, and that it be summarized in a way where I could make decisions on the operation of the fleet ....

And, of course, Mr. Hickman, at that time, told me that there were some drivers who were not bothering filling their forms correctly, or there were drivers who had problems filling the forms. And I told Mr. Hickman that I wanted those forms done properly, and that if a driver was refusing to do it, or wasn't doing it properly, to inform me.

Now, he also told me at the time that he had ... later on, that he had spent some time with Mr. Romano, telling Mr. Romano how to fill the forms, and that he still had a problem having those forms filled properly.

In the result, Mr. Romano was a convenient target for Mr. Zumpano's heightened, but not objectified standard of English proficiency. Mr. Romano's command of English was marginal. He could converse, follow instructions, and he had limited ability to write as was evidenced by the application for Board employment which was completed by his son. In saying this, however, it must be clear that there were others in the bargaining unit of bus drivers who probably did not possess the same level of English language skills held by Mr. Romano. I refer specifically to Mr. Palermo. The point though is that Mr. Palermo is a regular driver. As a full-time member of the bargaining unit, it would have been far harder for Mr. Zumpano to act against him than to act against Mr. Zumpano. Mr. Romano was last on the seniority list of the pool of drivers who were, in any event, hired on a limited basis. It is true that Mr. Romano was a member of the bargaining unit, but his rights extended only to the nature of his job as a temporary or spare bus driver, one who could be let go at will.

It was in the sense described that Mr. Romano was singled out. Moreover, it probably is true that when Mr. Zumpano judged applicants for the vacant job of bus driver that became available in January, he brought to the



process a mind set which elevated English proficiency and minimized other clearly important driver skills. More will be said about this shortly.

I return now to January. On the recommendation of Mr. Smith, and to fill a short-term need, Mr. Romano was given employment again as a temporary bus driver. During that time, Jim Clifton, a full-time driver, left the Board and his job became vacant. It is agreed between the parties that normal posting and procedures for the submissions of applications were followed relative to the vacant job. It is fair to say that Mr. Romano must have had high hopes that he would be the successful candidate. After all, his was the only application from within the bargaining unit; he had driven a school bus for six years; and, with reason, he thought his record with the Board was that of a good employee. Indeed, at no point did Mr. Zumpano or any other member of management criticize his work on any ground, including that of proficiency in English.

As it happened, the vacancy to be filled was also the first appointment to be made by Mr. Zumpano following his appointment to the Board as Director of Transportation Services. There was a total of five applications collected by the Personnel Department which were handed over to Mr. Zumpano. It is his testimony that the following criteria were used to evaluate the candidates:

1. possession of a Class "B" license;
2. length of time driving, including that given to school buses;
3. accident record;
4. defensive driving course;
5. proficiency in oral and written English, indicated in part by educational background;
6. overall impression flowing from interview.

Four of the five applicants were interviewed by Mr. Zumpano. One failed to show for the scheduled interview.

For the purpose of this complaint, it will suffice to compare the

successful candidate, Louis Kovacs, with Mr. Romano. Both had a Class "B" license. Mr. Kovacs had driven a school bus for only five months compared to six years for Mr. Romano. (I note, however, that Mr. Kovacs had thirty years of driving experience compared to twenty-five years for Mr. Romano.) Neither had any record of accidents. Mr. Kovacs apparently had completed two defensive driving courses. As stated before, Mr. Zumpano gave no consideration to the fact that Mr. Romano had been employed by the Board.

I come now to the critical part of the evaluation, namely, that of English language proficiency. What was it that Mr. Zumpano was seeking? In his written notes concerning the interviews, he had no assigned category for language proficiency; it seemed to fall under the classification of "others", which, by and large, contained only the educational level of the candidate. Mr. Kovacs had completed grade thirteen. After the name of Mr. Romano, a question mark was placed. Mr. Zumpano seemed to say in his testimony that he doubted that Mr. Romano had even completed grade five in Italy.

But, it was not educational level, as such, which concerned Mr. Zumpano. Rather, it was what he called the "literacy" of the candidate, and by that he meant proficiency in the English language. In setting this standard, Mr. Zumpano freely admitted that he acted on the basis of his own judgment. He did not know, and apparently did not inquire as to the standards of previous supervisors of transportation. Mr. Zumpano said, "I have no indication that my standards were different or similar to the two previous [supervisors] or the practice in that department." That proficiency consisted of two parts: the capacity to understand directives and to communicate verbally and, secondly, writing and reading skills. In a sense the verbal or spoken skills have already been discussed. A word should be said about what Mr. Zumpano intended to achieve through written skills:

I felt, and I still feel, that I don't necessarily need a highly educated person to function as a bus driver, but I do believe that you have to have a certain level of literacy to properly discharge your duty as a bus driver . . . .

There are certain requirements of the job which have to do with understanding documents, that they may be passed along to the driver, either in a memo form or as manuals, or whatever. Plus there is a certain amount of reporting to be done, which I do feel it is important for me to make decisions

at the end of the year, or in a current month, as far as what the operation . . . what is taking place outside there that I don't see, and functioning in an emergency situation to accidents, or whatever.

As to both parts, Mr. Zumpano conducted no tests. Indeed, Mr. Romano was employed by the Board as a bus driver during the few months following Mr. Zumpano's appointment as transportation supervisor. Yet, Mr. Zumpano stated that he did not get to "know" fully the drivers whom he supervised for about one year.

What was clear to Mr. Zumpano from even a surface observation was that Mr. Romano had limited spoken proficiency and even more limited writing capacity in English. On the face of Mr. Romano's initial employment application to the Board, it was noted that the form had been completed by Mr. Romano's son.

I believe that Mr. Zumpano thought he saw an opportunity to select a candidate for the job vacancy who clearly had a good command of the English language, both spoken and written. On a comparative basis, Mr. Kovacs surely ranked higher in terms of that command than Mr. Romano. And, in selecting Mr. Kovacs, there was also a message that Mr. Zumpano was sending to his department: More attention would be paid in the future to language proficiency.

Again, Mr. Romano was used to deliver that message in my view. After Mr. Zumpano made his choice of Mr. Kovacs to fill the position of driver, he called Mr. Romano into his office in February to communicate the decision made. (It should be noted that although Mr. Romano is a member of the bargaining unit, no grievance was then or thereafter filed by the union protesting the decision made by Mr. Zumpano. The purpose of noting this is only to indicate that apparently the decision fell within the purview of management rights and the selection process as set out in the collective agreement.)

Mr. Romano, it will be recalled, at the time of the selection process was employed on a temporary basis as a bus driver. He had been rehired to fill in for two regular drivers absent on Workers' Compensation. One of the two drivers was able to return to work. Mr. Romano's services were no longer needed.

However, Mr. Romano thought that he was still part of the pool of temporary drivers. He was to learn otherwise. Mr. Zumpano called Mr. Romano to his office. Mr. Zumpano had determined to remove Mr. Romano from the pool of temporary drivers; he was no longer to have any employment as a bus driver for the Board. In making that decision and the rationale for it, I believe Mr. Zumpano sounded a message concerning his view of English language proficiency to others within his department. Mr. Zumpano set out his reasons for removing Mr. Romano from the temporary driver pool:

Again, I had a little problem, too, at that time. I felt that to have kept Mr. Romano on staff for any prolonged period of time, I would have been unfair and misleading to Mr. Romano, to keep him on staff while I knew that I didn't feel comfortable offering Mr. Romano a more permanent position with the Board.

Mr. Romano was deeply disturbed. It was one matter not to be awarded the permanent position. It was quite another matter to be totally removed from employment when he had every reason to believe that he had been doing a good job.

About two weeks following his termination (February 25), a meeting was held with Mr. Zumpano. At the meeting were members of the Union executive, Mr. Romano, his wife, an officer from the Board's personnel department, and a Board Trustee. Mr. Zumpano described the meeting:

The matter under discussion in that meeting was why Mr. Romano was not given the vacant position, and at that time, I explained to the people who were present the reason why I felt that ....

The reason I felt at that time, and I told everybody present there, that I felt that ... for a bus driver working for the North York Board of Education to be able to discharge his daily responsibilities in a way that I felt was necessary, you need a certain level of proficiencies in the ... verbal and written English language.

...

[T]he conclusion of that meeting was that I felt that I made the best decision and that Mr. Kovacs was going to remain as the

person who replaced Mr. Clifton.

Mr. Zumpano has adhered to his position relating to Mr. Romano. The temporary pool of drivers continued. If Mr. Romano had been retained as a temporary driver after February 25th, he would have had occasional employment. Indeed, Mr. Zumpano took as a temporary driver an individual who had retired as a bus driver for the Board, Freddie West. Mr. Zumpano's surface reason for doing this was that Mr. West worked only occasionally; he assumed that Mr. Romano wanted only regular employment. I do not accept that conclusion. Mr. Zumpano never allowed Mr. Romano the choice. Mr. Romano was terminated, in my view, precisely because he did not measure up to Mr. Zumpano's somewhat subjective view of English language proficiency. Moreover, I find that that standard was unreasonable relative to the job of being a bus driver: It lacked any method for objective determination, and it failed to take into consideration the Board's own announced goal of employing from within.

The standard was discriminatory and it was unreasonable. But, does it follow that the standard was violative of section 10 of the Code? Before proceeding further, I must emphasize that my jurisdiction, my power to remedy wrongs is not plenary; it is circumscribed by the Code. A Board of Inquiry is not a civil court. Nor is it a labour arbitration board. Nor is it the Labour Relations Board.

Section 10 of the Code provides:

A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member.

Discrimination on the basis of English language proficiency meets the first condition of section 10: It is discrimination, but not on a prohibited ground. The question to be faced now is whether the second test of section 10 is satisfied: Has the standard of English proficiency resulted in an exclusion identified on a prohibited ground, namely, ancestry, place of origin, or ethnic origin?

Commission Counsel argued forcefully that there is a qualified group of

whom Mr. Romano is a member: The group consists of those who have immigrated to Canada from Italy with linguistic skills similar to Mr. Romano.

Consider now the Commission's evidence in support of its argument: A statistical abstract from Statistics Canada was introduced. It provided raw figures concerning the numbers of persons immigrating to Canada and settling in Ontario from Italy according to the 1981 Census. The Commission indicated that the only purpose of the abstract was to show the "numbers that we are dealing with." And, the numbers are substantial. 251,495 persons answered that they had come to Canada from Italy. Of these, 168,580 were employed in the labour force. Nearly ten percent of this group are unable to carry on a conversation in English.

I consider the statistics only background; I do not believe that they, as such, go to establish the group within the meaning of section 10 of the Code and this complaint. (See, In The Matter of Ms. Rosetta Blake and the Ministry of Correctional Services, Mimico Correctional Institute, Sept. 10, 1984, unreported, (Prof. Cumming), at pp. 26 et seq..)

The evidence concerning the group came entirely from John Lepore, acting director for the rehabilitation centre of Costi-IIAS Immigration Services. The organization, an amalgamation of two agencies, is non-profit and has served primarily the Italian community in Ontario for more than twenty-five years, assisting Italian immigrants to integrate into Canadian society. (At the present time, the mandate of Costi-IIAS (Costi) extends to all immigrants, not just those of Italian descent.)

The assistance provided by Costi is designed to carry forward their goal of integration through education. This is done in part through needs assessment, employment counselling, settlement services, housing, general orientation, and teaching English as a second language.

A word should be said about English as a second language course. This is what Mr. Lepore, whose credentials to speak as an expert are, I believe, beyond question, said:

The title of the training is called English as a Second Language. It is provided in cooperation with the North York Board of Education... and two teachers employed by the North York Board of Education. It is English as a second language. It



is essentially instruction, specialized instruction whereby a non-English speaking student is taught the conversation, reading and writing skills at the basic level . . . The basic level would be to identify where he lives, provide information perhaps in a job interview, be able to provide demographic or pertinent information to an English-speaking person, perhaps his social insurance number, work history, what kind of work he has done before. Basic level would be just on the conversational or speaking skills.

...

[I]f you would go to an English as a Second Language class, do you achieve a standard that is equal to any standard that we find in a normal educational system?

It depends on how well the student himself progresses. That is based, the level of progression, on the capacity of the student to acquire those skills.

It, ESL [English as a Second Language], for the most part is individualized because the teacher has to be aware what the student capacities are. If a student has, say a grade five education, he is perhaps functionally literate in his own language. It will be difficult, extremely difficult to progress to a level where he could be immersed in a regular classroom.

In 1985-1986, Costi served about 40,000 clients through ten centres located in Metropolitan Toronto. (One of these centres is located in North York.) Mr. Lepore estimated that more than 50 percent of those served by Costi were of Italian descent. The level of contact with Italian immigrants over the years certainly has given Costi expertise in understanding immigration patterns, needs, difficulties, and employment problems and opportunities relating to the clientele it serves.

At a number of levels, Mr. Lepore qualifies as an expert to speak of Italian immigration to Ontario and patterns of difficulties encountered generally and particularly by immigrants at specific points in time. Mr. Lepore has served for seven years in a senior position with Costi. He has counselled about two thousand clients, mostly of Italian descent. More than half of this number were part of a large Italian immigration to Canada in the



1950s and 1960s. More will be said of Mr. Lepore's conclusions relating to drawing a profile of such immigrants shortly. It is enough to say here that Mr. Lepore has brought to his job professional skills as a certified counsellor.

Finally, and not by any means least, there is the background of Mr. Lepore, himself. He came to Canada at the age of fifteen. His father was a music teacher, but because of a limited command of English, his father obtained work as a truck driver delivering groceries. About five years later, after had obtained a grasp of English, his father returned to teaching music from a storefront location. Mr. Lepore, the son, completed high school, enrolled and matriculated through the University of Toronto where he received a B.A. degree, and then enrolled and completed another course of study at the University of Toronto Faculty of Education.

I come now to the Commission's attempt to define the group for the purpose of this complaint through the testimony of Mr. Lepore:

Q. Based on that experience that you have had with those people, those hundreds of clients that you see, can you tell me whether there is a profile on an average Italian immigrant to Ontario who came during that period [the 1950s and 1960s]? What is that kind of person like?

A. He comes from southern Italy, perhaps the non-industrialized environment. He was functioning in an agricultural environment. He has a poor educational background, perhaps up to grade five elementary school. He has never worked in an industry, and he doesn't have a clue of English. He was never taught English in Italy.

....

Q. Mr. Romano indicated yesterday that he was from Cosenza.

A. Cosenza is a town in the region ... we call Calabria, which is the south-most region of Italy. In 1950/60, perhaps even early 1970, it was still underdeveloped as opposed to the northern part of the Italian nation.

Q. Do you know why there were so many immigrants from the

southern part of Italy?

A. ... [T]here was not work available. Therefore, they had to immigrate because of needs to countries where there was a need for workers ... Canada was such a country at that time.

It was precisely such immigrants who were targeted by Costi for assistance. The English as a Second Language classes served an important purpose, among other things, to help immigrants understand sufficient English to pass the necessary test for Canadian citizenship. Clearly, however, this was only a beginning. According to Mr. Lepore, a significant number of Italian immigrants in the 1950s and 1960s continued to have language problems even as they dispersed throughout Metropolitan Toronto into such areas as the Jane-Finch corridor of North York:

A. ... the fact that he [the profile immigrant described by Mr. Lepore] does not have our educational level will preclude ... attainment of proficiency equal to a native born. You have to look at myself as well. I came here at fifteen. Even though I went through university training, I still have an accent, and I still have sometimes problems in verbalizing my thoughts in correct English, and I came from sort of a middle class family. My father was educated, more or less, but I still have problems.

If you imagine an individual who has not had that kind of home environment, who has not had the capacity, the financial capacity to continue in school, because he had to work, if you can imagine a person that was supposed to, in order to maintain himself because Italians ... are not willing to go on welfare ... they like to be self-sufficient so that the majority have taken trades, such as construction trades, heavy labour, in order to make good money, in order to make a good living. But yet that kind of education, ability to go to school ... was sort of hindered by the fact of the heavy work they were doing, and they were not able to attend to English classes at night. That was one of the major problems ....

But, after many years in Canada for the profile Italian immigrant described by Mr. Lepore, how did the level of English language proficiency affect that person's capacity to work? Mr. Lepore stated:

A. After a period of being here, they [the profile immigrant earlier described] have acquired rudimentary English skills that made them able to meet the expectation of the labour market .... It is my personal work experience, that when I am trying to look for placement ... for one of my clients, who has the skill to do the job, but is not proficient 100 percent, I discuss the case with the employer, indicating or advocating on the client's behalf that he can do the job, is motivated to do the job, and has the skills to do the job. If the only negative attribute is 100 percent English proficiency, I [try] to convince the employer that this does not mean that the future employee cannot function according to his expectation.

Q. Can you tell me whether those particular immigrants, those who came from Italy in the fifties and sixties, do they have any particular problems in relationship between employment and English skills?

A. There were a lot of problems, and there are still problems, as far as employment and English. Certain employers require a job application to be filled, job interviews where a variety of topics are discussed. And, it might be perhaps the nature of our system, as far as hiring people through interviews, where the verbal feedback, the English communication skills, they become a sort of window of the personality and the capabilities and skills of an individual.

Q. Can you ... describe the English that they have?

A. ... Those that reach a certain level of employability in their skills, they will communicate verbally. Their spoken English will be understood ... Speaking there should be no problem. Even though there is a marked accent, the thought always can be communicated, and the person is understood.

Writing and reading ... are sort of at a level that even the most proficient of my clients will never reach proficiency such as you and I ... Because of syntax, grammar, spelling, especially English spelling, we have a lot of problems at times. So, I would say that the communication skills at the verbal level ... are satisfactory. Reading and writing, they will

require more time and keeping in mind the lower level of education, I don't think they will be obtainable ....

....

The bottom line is that even though the worker has the ability to meet an employer's expectation in terms of skills, motivation, attitude, work habits, and if it is lacking, English proficiency, because of the reason discussed before, the fact that the resources were not there at the beginning, the fact that, even though he can master rudimentary spoken English, he cannot upgrade himself because of his intellectual capabilities. The fact remains that all immigrants of Italian background will never be proficient, as I am not proficient myself today.

To summarize, this then is the testimony of Mr. Lepore: During the 1950s and 1960s, a significant portion of the Italian immigration to Canada, and more particularly to Ontario, were individuals from the southern portion of Italy, on the whole impoverished and rural. Many of the new immigrants had a very limited education; they were only functionally literate in their own language. This was a built-in difficulty in learning a new language beyond the rudimentary requisites necessary to speak English in the work place. What is more, the new immigrants had but limited time to attend evening classes for language proficiency; they struggled to earn a living. It is entirely appropriate for these immigrants to be required to meet the reasonable criteria incident to doing a job. It is entirely unfair for them to meet language requirements that are not reasonably related to the job. This, to Mr. Lepore and to the Commission, results in discrimination that forecloses a large group of people from competing fairly in the job market. What Mr. Lepore endorses is job classification and objective testing to determine the realistic skills of individuals to perform those jobs.

Considerable space has been given over to setting out the testimony of Mr. Lepore upon which the Commission's bottoms its factual case for delineating the group. Viewing the evidence most favourably to the Commission, there simply is no basis for finding that English language proficiency requirements of the Respondent Board impact in any special way on individuals because they are of Italian origin. Rather, those requirements impact heavily on those who have limited educational tools and time to overcome language difficulties. They would impact heavily on

those individuals born in Canada who remain functionally literate. The requirements of the Respondent Board are not designed and do not have the impact of singling out any particular group.

The result is that factually the Commission has not met the burden imposed by section 10 of the Code in defining a group identified by a prohibited ground of discrimination. Without meeting this burden, the complaint must fail.

In *Malik v. The Ministry of Government Services*, 2 C.H.R.R. 43335, D/374 (Eberts 1981), the Board of Inquiry considered the question of definition of group in a situation where the use of an interview process was challenged as having a prohibited discriminatory impact in job selection. While the facts and the framework for determination are different than that presented in this complaint, the comments of the Board of Inquiry do have some relevance:

¶ 3373. There is an added difficulty. The suggestion was really that Mr. Malik's culture and upbringing made him poorly suited to perform well in an interview, even though his actual work performance was good. By suggesting that the interview result be invalidated because of its negative cultural implications, counsel for the Commission is indirectly asking that the employer be told to design its selection mechanism in a way that would be sensitive to the strengths and weaknesses of applicants. These would be strengths and weaknesses, mind you, arising from or connected with race, creed, colour, nationality, ancestry or place of origin, for the Code does not prohibit employer insensitivity to weaknesses stemming from other causes, like poverty or unstable family background. Yet, the Code itself states in section 4(4):

No person shall use or circulate any form of application for employment or make any written or oral inquiry ... that requires an applicant for employment to furnish any information concerning race, creed, colour, nationality, ancestry or place of origin.

How the employer is to insure a sufficient degree of even-handedness, given its inability to ascertain this

information, was not elaborated upon. Similarly, even if he or she knew the exact composition of the applicant pool, it would be necessary to have in addition sensitive and accurate information about the strengths and weaknesses of each culture. How to prevent the intrusion of stereotype and assumption, and how to ensure that the selection mechanism is fair for each, differently composed, applicant pool without being prohibitively costly, are additional problems upon which we were not enlightened by counsel. Lastly, it is surely inevitable that someone whose culture and upbringing made him or her particularly suited to the interview format could complain if he or she were denied access to it because of the accident of the cultural composition of the group of his fellow applicants on a particular occasion.

¶3374. One can say, of course, that too much concern about these issues in Mr. Malik's case is just needless resort to a "floodgates" argument. Yet this raises all too well the problems lurking close to the surface of the Commission's argument. The "indirect discrimination" approach was developed in the U.S. cases dealing with very broad groups of persons, first blacks then women. In *Singh v. S.I.S.*, (Cumming, May 31, 1977), its use in Ontario was begun in a case involving a broad grouping where it could be assumed that all, or most, members of a well-defined group would be hurt by the requirement. *In this case, the group is very ill-defined; its boundaries depend on intangibles like "upbringing", "culture", the degree of modernization or Westernization in a person's country of origin, and the length of time in Canada. All in all, the policy and factual basis for acceding to an argument of indirect discrimination here is just too remote.* [Emphasis added.]

In support of its position, Commission Counsel cited Dhaliwal and Director, Human Rights Code, 6 C.H.R.R. ¶20967 D/2532 (Hickling 1985)(second award). The Board of Inquiry, acting under the British Columbia Human Rights Code, R.S.B.C. 1979, ruled that the English proficiency requirements of the respondent company were not *bona fide* qualifications for entry level jobs, and accordingly violated the B.C. Code. The test that was imposed was not seen by the Board of Inquiry as objective; it did not allow for a fair measure of the candidate's merits. It



was in this regard that the Board of Inquiry cited Ontario Human Rights Commission v. Borough of Etobicoke, (1982) S.C.R. 202. There the Supreme Court of Canada reviewed the claim of a *bona fide* employment requirement of mandatory retirement for a firefighter. It said that the Board of Inquiry was correct in demanding more than impressionistic evidence that mandatory retirement should be at a certain age. On the facts, more objective or, if you will, scientific evidence, was called for.

With the greatest respect, neither case bears on the issue of definition of group. Dhaliwal involves a statute that is quite different from the Ontario Human Rights Code. The relevant provision of the B.C. law that the Board of Inquiry applied provides:

8(1) Every person has the right of equality of opportunity based on *bona fide* qualifications in respect of his occupation or employment of an intended occupation, employment, advancement or promotion; and, without limiting the generality of the foregoing,

(a) No employer shall refuse to employ, or to continue to employ, or to advance or promote that person, or discriminate against that person in respect of employment or a condition of employment

...

unless reasonable cause exists for the discrimination.

There then follows a listing of *per se* exclusions from what might be considered reasonable cause. That listing, however, does not bar the Commission from imposing the general standard of reasonable cause as a measure of employer action. There is, in sum, no specific need to identify a group. Rather, each person seems to have the right to question conditions relating to employment on reasonable cause grounds.

I do not have this power under the Ontario Human Rights Code. Though it is clearly, *abiter*, I do say that if the B.C. standard were applicable to the facts in the complaint before me, there is compelling evidence to indicate that in the formulation and implementation of its English proficiency criteria, the Respondents did not act reasonably.



For a different reason, the Etobicoke case also is not appropriate to a determination of the issue of definition of group. On its face, the action of the respondent in Etobicoke was to discriminate on a prohibited ground, namely, age. The question before the Board of Inquiry was whether there was a *bona fide* reason for the discriminatory act. It was in that setting and on those facts that the Court sustained the Board of Inquiry's demand for objective testing.

Finally, the Commission has noted the case decided by the United States Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971). There the Court was called upon to construe the meaning of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. Specifically, the Court was asked to determine whether certain employment tests were discriminatory as against blacks. The Court held that the tests were discriminatory in their effect. Then, having done this, the Court required the employer to demonstrate objectively "a manifest relationship to the employment in question." (*Id.*, at 432). Important to any analogy to the matter before this Board of Inquiry, however, is that the burden on the employer arose "only after the complaining party or class has made out a prima facie case of discrimination, i.e. has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants" (Albermarle Paper Co. v. Moody, 422 U.S. 405, at 425 (1975)). There simply is no pattern of effective discrimination on any of the prohibited grounds enunciated in the complaint that has been proved by the Commission.

For the reasons stated, the complaint must in all respects be dismissed. In doing this, I must emphasize that my decision is, as it must be, based on the Human Rights Code. It is that law alone that I am called upon to interpret and apply. I do not have the power, as I have indicated elsewhere in this award, to apply a general standard of reasonableness.

Mr. Romano, in good faith, strongly feels that he has been wronged. I have tried to set out the facts fully. It may well be that Mr. Romano has been wronged. The power, however, does not exist under the Human Rights Code to remedy that wrong.

Accordingly the complaint is dismissed.

IT IS SO ORDERED.

DATED THIS <sup>2</sup>5<sup>th</sup> DAY OF JULY, 1987 AT TORONTO, ONTARIO.

A handwritten signature in dark ink, appearing to read 'D.J. Baum', written over a horizontal line.

Dr. D.J. Baum  
Board of Inquiry